SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 354

HOWARD JAMES HANSEN,
d/b/a H. J. HANSEN AND COMPANY, and
HOWARD J. HANSEN Individually
Petitioner

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMBIA CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Howard J. Hansen, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above entitled case entered on the 30th day of April, 1968.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is printed in Appendix "A" hereto, infra, page 7.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on the 30th day of April, 1968. Rehearing was denied on June 5, 1968. The jurisdiction of the Court is invoked under 28 U.S. Code, paragraph 1254(1.).

QUESTIONS PRESENTED

The questions presented for review are:

Was the transcribed testimony of witnesses in a prior case before the Securities and Exchange Commission, between the same parties, admissible in evidence against this Petitioner in a second case, where the witnesses were available and present at the hearing on the second case?

Was it a violation of the rights of the Petitioner to use testimony of others taken out of his presence in a prior case which had been dismissed, even though the parties were the same?

Was the error of using such transcribed testimony of witnesses against the Petitioner overcome by the production of the witnesses at the hearing on the second case some four years after the event?

If such production of the witnesses did overcome the objection to the transcribed testimony, would the lack of memory of such produced witnesses upon their cross-examination affect the use of such transcription of their testimony?

STATEMENT

An original proceeding was commenced on the 30th day of March, 1961 before the Securities and Exchange Commission against Atlantic Equity, Inc. The Petitioner was not a party nor was he involved in said original proceeding.

These original proceedings were later amended by adding to the proceedings on November 24, 1961, as a party, Siltronics, Inc.

Petitioner Hansen was notified that he might be "a cause" because of his involvement in an issue of stock by Siltronics, Inc. In this letter Hansen was given a choice of becoming a party to the cause or not being a party. Hansen elected not to be a party and made this fact known to the Respondent.

After he had made known this fact that he had elected not to be a party, he was officially excluded from the hearing. Later Hansen was called as a witness on May 18, 1962, and testified for two days; and the hearing was then transferred to Pittsburgh, Pennsylvania, but Hansen was never permitted to attend any of the hearings except for the two days when he testified. The hearings occupied forty-one days The hearings occupied forty-one days and they were held in Washington, D.C. and Pittsburgh, Pennsylvania. The last day of the proceedings in this case was June 28, 1962.

The Respondent voluntarily terminated these proceedings on the 21st day of December, 1962. The basis of the decision by the Respondent to dismiss was the result of a decision of the United States Court of Appeals for the District of Columbia Circuit—namely, *Treat & Company v. S.E.C.*, 113 U.S. App. D.C. 100, 306 Fed. 2d 260.

On the 24th day of January, 1963 the Respondent reinstituted proceedings. Hansen was duly notified, and this time he elected to be a party. On the 22nd day of April, 1963 an open hearing was begun, and this time the Respondent offered in evidence the prior record of the testimony of numerous witnesses as taken in the original proceedings, from which hearings Hansen had been excluded except for the two days when he had testified as a witness. This testi-

mony had been taken in the case which had been dismissed against Hansen and other parties.

To the offer of this transcript Hansen—through his counsel—objected. The question of the admissibility of this transcript was argued and, on June 5, 1963, the motion to offer the transcript of the record against Hansen was withdrawn.

On October 28, 1963 Hansen applied for a broker-dealer registration. On November 26, 1963 the Commission ordered a consolidation of the application by Hansen and reinstituted proceedings. On the 9th day of December, 1963 the Respondent again offered the transcript of the record which included the testimony of the witnesses in the prior dismissed case against Hansen. This is the same transcript of testimony which had been offered, objected to and withdrawn. On the 27th day of December, 1963 the motion was granted admitting the transcript of the testimony of numerous witnesses in the prior case against Hansen.

On the 2nd day of January, 1964 Hansen—no longer represented by counsel—appealed this decision to the Commission. The Commission confirmed said decision. The witnesses whose testimony had been admitted in transcript form were actually produced in person at the hearings and tendered for cross-examination. Beginning on January 14, 1964 Hansen—who was not an attorney—attempted to represent himself and to cross-examine the witnesses; but, because they had no substantial memory as to the events occurring between October, 1960 and July, 1961, he made no headway in establishing any facts through any cross-examination. He terminated all attempts to cross-examine after March 19, 1964, having attended hearings on approximately twenty days in this pursuit of the facts.

On July 11, 1967 a decision was rendered by the Respondent holding that Hansen was guilty of manipulating Siltronics, Inc. stock, and the application for registration as a broker-dealer was denied, and an Atlantic Equities, Inc. registration as a broker-dealer was revoked, and Hansen was named in this decision as a cause of the revocation. The

appeal to the United States Court of Appeals for the District of Columbia Circuit followed.

REASONS FOR GRANTING THIS WRIT

Your Petitioner says that the problem here presented is of grave importance to him, and perhaps to others in a like situation—although it does not indicate any "world-shaking" decisions.

Basically we seek the Court's aid in order to prevent a use of evidence which is so contrary to standard and accepted procedures as to amount to a violation of the rights of the Petitioner.

If it is to be the law that transcribed evidence taken of witnesses in cases which have been dismissed, can then be re-used in later proceedings, some guide or verification is needed in order that the methods used should not be enlarged but should be controlled.

The use of testimony from a prior case in all court and related proceedings is governed by the standards long accepted in the Anglo Saxon World—that is to say, that the record be available in transcribed or other form, that the parties be the same, and that the witnesses whose testimony is being used be not then available to testify in person.

Apparently the United States Court of Appeals for the District of Columbia Circuit is of the opinion that, even though the Petitioner was not present when the testimony was taken—having been excluded—the evidence still could be used. It was further of the opinion that, even though the witnesses were present and could have testified, they did not have to testify, but rather the record of their testimony taken some years before could be used.

And, finally, it believed that, although the witnesses whose testimony had been transcribed lacked memory of the prior events at the time of the hearing in the second case, nevertheless the obvious difficulties of cross-examining without memory on the part of the witnesses did not prevent the use of their transcribed testimony.

The same Court of Appeals many years before, passed upon what we consider to be a similar question, but reached a different conclusion. We rely upon *Karick v. Cantrill*, 53 App. D.C. 346, 290 Fed. 321 (also see *Bowie v. Hume*, 13 App. D.C. 286; Federal Rules of Civil Procedure 43(a); and Rule 14(a) of the Securities and Exchange Commission).

CONCLUSION

It is respectfully requested that this case be reviewed.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,282

HOWARD JAMES HANSEN, d/b/a H. J. HANSEN AND COMPANY, and HOWARD J. HANSEN, Individually, Petitioners

v.

SECURITIES AND EXCHANGE COMMISSION, Respondent

Petition for Review of an Order of the Securities and Exchange Commission

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Decided April 30, 1968

Mr. Mark P. Friedlander for petitioners.

Mr. Edward B. Wagner, Assistant General Counsel, Securities and Exchange Commission, of the bar of the Supreme Court of Illinois, *pro hac vice*, by special leave of court, with whom *Messrs. Philip A. Loomis*, General Counsel, *David Ferber*, Solicitor, and *William R. Schief*, Attorney, Securities and Exchange Commission, were on the brief, for respondent.

Before WILBUR K. MILLER, *Senior Circuit Judge*, and BURGER and WRIGHT, *Circuit Judges*.

PER CURIAM: Petitioner Hansen asks review of a Securities and Exchange Commission order[1] which denied his application for registration as a securities broker and found peti-

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[1] The Commission's order was issued pursuant to § 15(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78*o*(b) (1964 ed.).

tioner responsible, in part, for the revocation of the registration of Atlantic Equities Company. The only question raised on this appeal is whether the testimonial record of a prior proceeding[2] against Atlantic, involving the same stock fraud on which the Commission's order against petitioner was based, was properly admitted into evidence in this proceeding. Since the witnesses who testified in the prior proceeding were made available to petitioner for cross-examination, we find no error.[3]

The rules applicable to conventional judicial proceedings are not necessarily applicable to administrative proceedings. In a matter such as this one, involving charges of fraud and manipulation in the issuance of stock, with a lengthy record, it was within the Commission's discretion to receive the transcribed testimony, while still comporting with fairness to petitioner by offering the opportunity to cross-examine any witness whose transcribed testimony was so received.

Affirmed.

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[2] Petitioner was notified in the prior proceeding that, as an associate of Atlantic, under Commission Rule 9(b) he had a right to participate. 17 C.F.R. § 201.9(b) (Supp. 1968). He declined. *See Wallach v. Securities and Exchange Commission*, 92 U.S.App.D.C. 108, 202 F.2d 462 (1953).

[3] *See* A.L.I., MODEL CODE OF EVIDENCE, Rule 503 (1942); 5 J. WIGMORE, EVIDENCE §§ 1362, 1365, 1395 (3d ed. 1940). *See also Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 705-706 (1948); *Freight Consolidators Cooperative, Inc.* v. *United States*, S.D. N.Y., 230 F.Supp. 692, 699 (1964); *Garner* v. *Pennsylvania Public Utility Commission*, 177 Pa.Super. 439, 110 A.2d 907 (1955).

SUPREME COURT, U. S.

In the Supreme Court

OCTOBER TERM, 1975

EDWARD JAMES FRANDSEN, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 354

HOWARD JAMES HANSEN, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 7–8) is not officially reported. The opinion of the Securities and Exchange Commission, Securities Exchange Act Release No. 8118, is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1968. A petition for rehearing was denied on June 5, 1968. The petition for a writ of certiorari was filed on July 29, 1968. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

318-217—68

QUESTION PRESENTED

Whether petitioner was denied a fair hearing by the admission into evidence of the record of a prior administrative proceeding involving the same issues and the identical parties, when petitioner declined an opportunity to participate as a party in the prior proceeding and was given an opportunity to, and did cross-examine the witnesses whose testimony was contained in the record of the prior proceeding.

STATEMENT

On January 24, 1963, the Securities and Exchange Commission instituted a consolidated administrative proceeding to determine whether to take disciplinary action against Atlantic Equities Company (Atlantic) and seven other securities brokers and dealers registered with the Commission. All eight firms were alleged to have manipulated the market for a "hot issue" of a low-priced stock underwritten by Atlantic (R. 10166–10170).[1] Twelve individuals associated with these broker-dealer firms—including petitioner Hansen, who had been the manager of Atlantic's underwriting department—were charged with personal responsibility for the alleged market manipulation and accepted the Commission's offer to appear in the proceeding to answer that charge (R. 10213–10216, 10225–10226).[2] On October 28, 1963, while he was participat-

[1] Section 15(b)(5)(D) of the Securities Exchange Act of 1934, 15 U.S.C. 78*o*(b)(5)(D), authorizes the Commission to discipline registered broker-dealers that have engaged in willful violations of the federal securities laws.

[2] At the time of the instant proceeding, the Commission had no statutory authority to bring disciplinary proceedings against

ing in the disciplinary proceeding, Hansen filed with the Commission an application for registration as a broker-dealer (R. 10280–10285). The Commission then instituted another administrative proceeding to determine whether Hansen's application should be denied, and that proceeding was consolidated for hearing with the disciplinary proceeding (R. 10286–10292, 10301–10302).[2]

On July 11, 1967, the Commission found, *inter alia*, that Atlantic had engaged in a market manipulation, and revoked its broker-dealer registration. The Commission also found that Hansen was "one of the principal architects of the scheme" and was a cause of the sanction imposed on Atlantic, and it denied his application for registration (J.A. 58–62, R. 10630–10632).

Hansen petitioned for review of the Commission's decision, claiming error in the admission into evidence of the record of a prior disciplinary proceeding involving the same market manipulation. The court of appeals affirmed *per curiam* (Pet. 7–8).

The prior proceeding had been instituted by the Commission on November 24, 1961, against Atlantic and the same seven other broker-dealers (R. 10050–

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individuals associated with registered broker-dealers. *Wallach* v. *Securities and Exchange Commission*, 202 F. 2d 462 (C.A. D.C.). Since the decision in such a proceeding might nevertheless adversely affect such individuals, the Commission followed the policy of offering them an opportunity to participate in the proceeding if they so desired. Former Rule 15b-9(b), 20 Fed. Reg. 7036 (1955).

[2] Section 15(b)(5)(E) of the Securities Exchange Act of 1934, 15 U.S.C. 78o(b)(5)(E), authorizes the Commission to deny a broker-dealer application of any person who has willfully participated in a violation of the federal securities laws.

10057). Hansen, together with the same other individuals, was charged with personal responsibility for the market manipulation and was advised of his privilege to participate as a party (J.A. 11–12, R. 9822). On the first day of the hearings, Hansen's counsel stated that his client had elected not to participate as a party (J.A. 98, R. 3227). That afternoon, on the motion of the Commission's staff to sequester the witnesses, and without objection by Hansen or his counsel, the examiner ruled that Hansen could not sit in the hearing room until he was called as a witness; his counsel was allowed to remain, but chose not to do so (J.A. 99, R. 3262). Hansen testified at length concerning his participation in the underwriting, but at no time did Hansen or his counsel seek leave to attend the hearing (J.A. 22). After forty-one days of hearings, Atlantic and other participants moved to terminate the proceeding because of a possible procedural defect.[4] The motion was granted on December 21, 1962, without prejudice to institution of a new proceeding based on the same charges (J.A. 15–16). At that time, the record consisted of nearly 5000 pages of testimony and over 300 exhibits (J.A. 70, R. 179).

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[4] In *Amos Treat & Co.* v. *Securities and Exchange Commission*, 306 F. 2d 260, decided during the course of the first proceeding, the Court of Appeals for the District of Columbia Circuit invalidated a broker-dealer proceeding because a Commissioner who participated in the decision had been a member of the staff when the matter was being investigated. The same Commissioner participated in the institution of the first proceeding involving Atlantic and Hansen, but he did not participate in the proceeding under review here.

At the outset of the proceeding under review here, Hansen's counsel stated that his client had elected to participate as a party in this proceeding (J.A. 68–69, R. 15). The Commission's staff introduced the record of the prior proceeding, with the understanding that Hansen would "be able to cross-examine any or all of the witnesses" who had testified in the prior proceeding (J.A. 70, R. 179). This record was admitted into evidence over Hansen's objection, and the Commission sustained the hearing examiner's ruling on an interlocutory application for review (J.A. 19–23, R. 10307–10308). At Hansen's request, numerous witnesses from the prior proceeding were recalled, and Hansen, although no longer represented by counsel, cross-examined most of them (J.A. 75–79, 82–86, 91–96; R. 927–928, 933–936, 1320–1324, 1345–1346, 1863–1870).[5]

ARGUMENT

As noted above, a record consisting of nearly 5000 pages of testimony and over 300 exhibits had been compiled in the earlier proceeding involving the same parties and the same market manipulation. The Commission's staff could have prolonged the subsequent proceeding by calling each of the 40 witnesses who had previously testified and asking them the same questions. And to the extent that a witness could not fully recall the events, his memory could have been refreshed by his prior testimony. So long as petitioner's right to a fair hearing was preserved, it was

[5] Petitioner does not cite any part of the record to support his claim that these witnesses "had no substantial memory, as to the events * * *" (Pet. 4).

plainly within the Commission's discretion to avoid such a cumbersome and unnecessary procedure by admitting the testimony received at the prior hearing. See *Paramount Cap Mfg. Co.* v. *National Labor Relations Board,* 260 F. 2d 109 (C.A. 8); *Railway Express Agency* v. *Civil Aeronautics Board,* 243 F. 2d 422 (C.A.D.C.); *In re McNary,* 83 F. Supp. 121 (N.D.N.Y.).

The common-law evidentiary rules with respect to the admissibility of prior testimony in a subsequent judicial proceeding are not necessarily applicable in administrative proceedings. See *Federal Trade Commission* v. *Cement Institute,* 333 U.S. 683, 705–706. Moreover, the exclusion of such hearsay testimony, except in certain circumstances, in a judicial proceeding, is founded on the notion that it is unfair to deny the party against whom the evidence is offered an opportunity to test its trustworthiness by cross-examining the witness. Compare *Pointer* v. *Texas,* 380 U.S. 400, 404–405. Since petitioner had an ample opportunity to, and did, cross-examine the witnesses from the earlier proceeding, no unfairness resulted from the admission of the witnesses' prior testimony. See *Freight Consolidators Cooperative, Inc.* v. *United States,* 230 F. Supp. 692 (S.D.N.Y.).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1968.

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